U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: LOS ANGELES, CA Date:

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Interim District Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guatemala who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is the spouse of a naturalized United States citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse and children.

The interim district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Interim District Director*, dated September 23, 2003.

On appeal, counsel states that the waiver should not have been denied. Counsel asserts that the Immigration and Naturalization Service [now Citizenship and Immigration Services] misinterpreted the facts and took them out of context. Counsel further contends that the application contains evidence to support a finding that the applicant's spouse and children will experience hardship if the applicant is removed. *Form I-290B*, dated October 20, 2003.

In support of these assertions, counsel submits a brief, dated November 11, 2003 and a statement of the applicant's spouse, dated September 19, 2003. The entire record was considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
>
> > (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> > (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
> >
> > > (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
> > > (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> > > (iii) the alien has been rehabilitated; or

> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The record reflects that on June 29, 1988, the applicant was convicted of Lewd Acts with Child Under 14. The applicant was sentenced to one-year imprisonment and 92 months of probation. An application for admission or adjustment of status is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's I-485 application, so the applicant, as of today, is still seeking adjustment of status to that of a lawful permanent resident of the United States.

The crime involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the date on which the AAO is considering the applicant's appeal. The AAO finds that the interim district director erred in basing her decision on section 212(h)(1)(B) of the Act and failing to consider the eligibility of the applicant for waiver under section 212(h)(1)(A).

The record does not establish that the admission of the applicant to the United States would be "contrary to the national welfare, safety, or security of the United States." The applicant has not been charged with a crime since his conviction and the applicant's crime occurred more than 15 years ago, demonstrating the applicant's rehabilitation.

The grant or denial of the above waiver does not turn only on fulfillment of the statutory requirements identified at section 212(h)(1)(A). It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe.

The AAO notes that while the applicant's spouse references the crime for which the applicant was convicted, she indicates that she and the applicant have only spoken generally about the incident. *Affidavit of Ruy Gomez*, dated September 19, 2003. The applicant's spouse states that she will personally take steps to prevent any future accusations against the applicant, however, she does not assert that the applicant is rehabilitated and/or that he is personally committed to preventing future accusations and/or charges. *Id.*

Further, the record fails to demonstrate that the applicant's spouse and children would suffer extreme hardship in the absence of the applicant. The applicant's spouse states that she and the applicant have accomplished many things together. *Id.* She indicates that the applicant supported her in raising their children and continues to be involved in their education. *Id.* The applicant's spouse states that she and the applicant started and manage a business together. *Id.* The record reflects that the applicant's spouse is the owner of Carousel Recycling Center and that the applicant works in that business. Counsel contends that loss of income and business that has been built up over the course of many years constitutes hardship. *Brief in Support of Respondent's Form I-601*, dated November 11, 2003. Even if the applicant and his spouse own the business together as contended by the applicant's spouse and counsel, the record fails to establish that the applicant's spouse will be unable to continue the business or otherwise financially support herself in the

absence of the applicant. Further, the record fails to establish that the applicant will be unable to provide financially for his spouse from a location outside of the United States.

The applicant's spouse states that her family's life will be destroyed if the applicant is removed to Guatemala because it will be difficult for her to raise their children. *Affidavit of Ruy Gomez* at 5. Counsel asserts that the applicant seeks to provide the best for his children and that his removal will frustrate the efforts of the applicant and his spouse to educate their children. *Brief in Support of Respondent's Form I-601* at 4-5. The record reflects that the children of the applicant are 18 years of age and over. *See United States birth certificates for Henna Celeste Cruz, Shawn Edward Wate and Tracy Michele Wate.* The record fails to demonstrate that the adult children of the applicant are unable to provide financially for themselves and/or will be unable to continue their advanced studies as a result of the inadmissibility of the applicant.

The favorable factor in the application is the fact that the applicant has not been charged with a crime since his conviction and the applicant's crime occurred more than 15 years ago.

The unfavorable factors presented in the application are the applicant's conviction for Lewd Acts with Child Under 14 in June 1988; the failure of the record to demonstrate the applicant's remorse for his actions and the lack of hardship imposed on the applicant's spouse and children as a result of his inadmissibility.

The applicant has not established that the favorable factors in his application outweigh the unfavorable factors. The interim district director's denial of the I-601 application was thus proper.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.